



# **City of Santa Fe**

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## **NEWS RELEASE**

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March 19, 2013

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### **Mayor David Coss and Councilor Patti J. Bushee Encourage New Mexico County Clerks to Issue Marriage Licenses to Same-Sex Couples**

*Recognizing That Same-Sex Marriage is Legal in New Mexico; and  
Encouraging New Mexico's County Clerks to Issue  
Marriage Licenses to Same-Sex Couples.*

SANTA FE, NM – Mayor David Coss and Councilor Patti Bushee announced today that they are sponsoring a Resolution expressing support for gay marriage in New Mexico and encouraging County Clerks to issue marriage licenses to same-sex couples. The Resolution will be introduced at the next City Council meeting, scheduled for Wednesday, March 27.

"Santa Fe is a city of respect, acceptance, and diversity that embraces all of our residents," said Mayor David Coss. "I sponsored this resolution because all loving, committed couples should have the right to marry regardless of their sexual orientation."

"When couples want to celebrate their love and commitment through marriage, having a supportive community means everything," said Councilor Patti J. Bushee. "It is time to change New Mexico's slow road of marriage equality into a super highway."

"Marriage law in New Mexico is gender-neutral and does not define marriage as between a man and a woman," said Geno Zamora, City Attorney. "New Mexico already recognizes valid marriages performed in other states between same-sex couples; it would violate our state's constitution to deny equal rights in our own families."

In a written opinion, dated March 19, 2013, City Attorney Geno Zamora discusses the fact that New Mexico's statutory definition of marriage is gender-neutral and does not define marriage as between a man and a woman. Nor does New Mexico law prohibit same-sex marriage. Therefore, same-sex couples are capable of contracting within the law and capable of marrying in the State of New Mexico.

City Attorney Zamora's memo references nine states and the District of Columbia, which all issue marriage licenses to same-sex couples: Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and the District of Columbia. Another group of states constitutionally or statutorily defines marriage as between a man and a woman. New Mexico law does not speak directly to same-sex marriage.

### **Some Other States' Recognition of Gay Marriage and Related Family Law Rights**

In addition to **New York**, the following jurisdictions currently allow gay and lesbian couples to marry on the same basis as other couples:

- **Massachusetts** became the first state to issue marriage licenses to same-sex couples in 2004 after the Supreme Judicial Court of Massachusetts held that it was unconstitutional to only allow heterosexual couples to marry.
- **Connecticut** authorized marriages between same-sex couples after a challenge to its civil unions law was upheld by the Supreme Court of Connecticut in 2008 based on equal protection rights.
- **Iowa** recognized gay marriage after the Iowa Supreme Court upheld a district court decision, holding that no important governmental interest was served by denying marriage licenses based on citizens' sexual orientation.
- **Vermont**, which had been the first state to recognize civil unions in 2000, provided full marital rights to gays and lesbians in 2009 when the state legislature overrode the governor's veto of the same-sex marriage bill they had passed earlier that year.
- **New Hampshire** legalized gay marriage in 2010 when legislators approved a bill that built upon the civil-unions law that was enacted in 2007.
- **Washington, D.C.**, began issuing marriage licenses to same-sex couples in 2010, nearly 20 years after the city had first recognized registered domestic partnerships.

A copy of the Resolution and the opinion by City Attorney Geno Zamora is attached.

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# City of Santa Fe, New Mexico

## memo

### **CITY ATTORNEY'S OFFICE OPINION FOR PUBLIC DISTRIBUTION & INCLUSION IN CITY COUNCIL PACKETS**

To: Members of the Governing Body

From: Geno Zamora, City Attorney   
Jamison Barkley, Assistant City Attorney 

Re: Same-Sex Marriage in New Mexico

Date: March 19, 2013

#### **Overview**

New Mexico's statutory definition of marriage is gender-neutral. Since New Mexico does not define marriage as between a man and a woman, New Mexico does not prohibit same-sex marriage, New Mexico already recognizes same-sex marriages from other states, and the New Mexico Constitution requires equal treatment on the basis of sex, same-sex marriage is permitted in New Mexico.

#### **Background**

As of the date of this memorandum, nine states and the District of Columbia offer marriage licenses to same-sex couples: Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and the District of Columbia. Another group of states constitutionally or statutorily defines marriage as between a man and a woman. See *J.L.M. v. S.A.K.*, 18 So.3d.384, 389 (Ala. Civ. App. 2008) (recognizing that Alabama prohibits same-sex marriage because it defines marriage as a "unique relationship between a man and a woman"). New Mexico's statutory definition of marriage is gender-neutral and does not define marriage as between a man and a woman. See NMSA 1978, § 40-1-1 (1862-63).

## **New Mexico Already Recognizes Same-Sex Marriages from Other States**

New Mexico already recognizes marriages performed in other states, without regard to the sex of the parties:

All marriages celebrated beyond the limits of this state, which are valid according to the laws of the country wherein they were celebrated or contracted, shall be likewise valid in this state, and shall have the same force as if they had been celebrated in accordance with the laws in force in this state.

Section 40-1-4; see also *In re Bivians' Estate*, 98 N.M. 722, 726, 652 P.2d 744, 748 (Ct. App. 1982) ("New Mexico applies the rule of comity, that the law of the place of contract governs the validity of a marriage."); N.M. AG Op.No. 11-01 (2011) (concluding that a valid same-sex marriage performed in another state is valid in New Mexico). Hence, same-sex marriages performed in any of the jurisdictions where they are valid are recognized in New Mexico to the same degree as any New Mexico marriage.

## **New Mexico Does Not Define Marriage as Between a Man and a Woman**

New Mexico's definition of marriage does not refer to the gender of the parties. Rather, it emphasizes the consent of the parties: "[m]arriage is contemplated by the law as a civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential." NMSA 1978, § 40-1-1 (1862-63). Thus, the definition of marriage in New Mexico is gender neutral and does not include the restrictive definition "one man and one woman." *Id.*

## **A Marriage License May Not be Denied Based on the Sex of the Couple**

County Clerks are mandated under New Mexico law to issue marriage licenses. The only bases on which marriage licenses can be denied are when the potential spouses are relatives to a close degree and when one of them is a minor. See § 40-1-9. Same-sex marriage is not among the categories of prohibited marriages in New Mexico.

## **The New Mexico Constitution Guarantees Equal Rights on the Basis of Sex**

Although the statutory marriage application form is described in terms of male and female applicants, the form is trumped by the specific language of the marriage statute, which does not require that the applicants be of the opposite sex. Moreover, the New Mexico Constitution requires equality of rights under the law. The Equal Rights Amendment states:

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person.

N.M. Const. art. II, § 18. Because the New Mexico Constitution trumps state statute, the requirements of the Equal Rights Amendment are controlling.

#### **Substantial Compliance and Waiver of Form Are Permitted**

A county clerk could substantially comply with the statutory form provided even if the marrying parties are same-sex couples. See NMSA 1978, § 40-1-17 to -18 ("The form of application, license and certificate provided herein shall be substantially as follows . . . ."). Further, Section 40-1-12 allows sections of the marriage code to be waived. Therefore, in addition to the form not conforming with the more specific marriage statute, and being trumped by the Equal Rights Amendment, same-sex applicants and County Clerks may substantially comply with the form or request a waiver of the form.

#### **Same-Sex Couples May Petition for a Writ of Mandamus if Denied a Marriage License**

If its application for a marriage license is denied, a couple should petition the district court for a writ of mandamus directing the County Clerk to issue the license because the gender of the applicants is not a statutory ground for denial. N.M. Const. art. VI, § 3; § 44-2-4 (1884).

#### **Conclusion**

New Mexico law does not define marriage as between a man and a woman. Nor does New Mexico law prohibit same-sex marriage. New Mexico already recognizes same-sex marriages performed in other states and our Constitution requires equal treatment on the basis of sex. Same-sex marriage is legal in New Mexico.

**CITY OF SANTA FE, NEW MEXICO**

**RESOLUTION NO. 2013-\_\_**

**INTRODUCED BY:**

**Mayor David Coss**

**Councilor Patti J. Bushee**

**A RESOLUTION**

**RECOGNIZING THAT SAME-SEX MARRIAGE IS LEGAL IN NEW MEXICO AND  
ENCOURAGING NEW MEXICO'S COUNTY CLERKS TO ISSUE MARRIAGE  
LICENSES TO SAME-SEX COUPLES.**

**WHEREAS**, the Charter of the City of Santa Fe recognizes that Santa Fe has "a history  
of tolerance towards all people, cultures, traditions, and lifestyles;"

**WHEREAS**, the Charter also acknowledges that "the human and civil rights of the  
residents of the City of Santa Fe are inviolate and shall not be diminished or otherwise infringed;"  
and

**WHEREAS**, the struggle for equality among lesbian, gay, bisexual, and transgender  
people is the modern face of the Civil Rights Movement; and

**WHEREAS**, nine states and the District of Columbia currently extend marriage licenses  
to same-sex couples;

**WHEREAS**, Santa Fe has always been a proud leader in recognizing basic human rights

1 and in fighting against discrimination; and

2       **WHEREAS**, New Mexico's statutory definition of marriage is gender-neutral and does  
3 not define marriage as between a man and a woman, NMSA 1978, Section 40-1-1 (1862-63); and

4       **WHEREAS**, the only marriages prohibited by statute in New Mexico include those  
5 between relatives within a specified degree of relation and those with minors, Section 40-1-9, and  
6 New Mexico County Clerks are required by statute to issue marriage licenses when they are  
7 satisfied that the parties are not relatives and are at least eighteen years of age, Sections 40-1-10  
8 to -13; and

9       **WHEREAS**, New Mexico already recognizes same-sex marriages from other  
10 jurisdictions, Section 40-1-4; N.M. AG Op. No. 11-01 (2011); and

11       **WHEREAS**, the Constitution of the State of New Mexico requires that equal rights shall  
12 not be denied on account of the sex of any person, N.M. Const. art. II, Section 18; and

13       **WHEREAS**, if a marriage license is denied solely because the applicants are of the same  
14 gender, the judicial remedy is for a couple to file a writ of mandamus with the district court in  
15 that judicial district to require the County Clerk to issue the license, pursuant to the New Mexico  
16 Constitution art. VI, Section 3 and Section 44-2-4 (1884);

17       **NOW, THEREFORE, BE IT RESOLVED BY THE GOVERNING BODY OF**  
18 **THE CITY OF SANTA FE** that we, the members of the Santa Fe governing body, do hereby  
19 recognize that, under New Mexico law, same-sex marriage is legal in our State and that our  
20 State's citizens have the right to marry the partner of their choice for the following reasons:

- 21           1. New Mexico marriage laws do not define marriage as between a man and a  
22           woman;
- 23           2. Although our State statutes prohibit certain marriages, same-sex marriage is not  
24           prohibited;
- 25           3. Pursuant to New Mexico marriage statutes, a valid same-sex marriage from

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another state is recognized in New Mexico; and

4. To discriminate against same-sex couples would violate the New Mexico Constitution, which requires equality under law regardless of sex.

**BE IT FURTHER RESOLVED BY THE GOVERNING BODY OF THE CITY OF SANTA FE** that we strongly encourage New Mexico's County Clerks to follow state law and issue marriage licenses to loving, committed couples who have the right to marry the person that they love, including same-sex couples.

PASSED, APPROVED and ADOPTED this \_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
DAVID COSS, MAYOR

ATTEST:

\_\_\_\_\_  
YOLANDA Y. VIGIL, CITY CLERK

APPROVED AS TO FORM:

\_\_\_\_\_  
GENO ZAMORA, CITY ATTORNEY